516098

26 pgs

**Nos. 06-1195 and 06-1196**

---

IN THE

# Supreme Court of the United States

---

LAKHDAR BOUMEDIENE, et al.,
*Petitioners*,

*vs.*

GEORGE W. BUSH,
President of the United States, et al.,
*Respondents*.

---

KHALED A. F. AL ODAH, next friend of
FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al.,
*Petitioners*,

*vs.*

UNITED STATES, et al.,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

---

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345

*Attorney for Amicus Curiae*
*Criminal Justice Legal Foundation*

## QUESTIONS PRESENTED

The questions presented, as stated in the Government's Brief in Opposition, are:

1. Whether the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, removes federal court jurisdiction over habeas petitions filed by aliens detained as enemy combatants at Guantanamo Bay, Cuba.

2. Whether aliens detained as enemy combatants at Guantanamo Bay have rights under the Suspension Clause of Article I, Section 9, of the Constitution.

3. Whether, if aliens detained at Guantanamo Bay have such rights, the MCA violates the Suspension Clause.

4. Whether petitioners may challenge the adequacy of the judicial review available under the MCA and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, before they have sought to invoke, much less exhaust, such review.

This brief *amicus curiae* addresses Question 2.

## TABLE OF CONTENTS

Questions presented ..... i

Table of authorities ..... iv

Interest of *amicus curiae* ..... 1

Summary of facts and case ..... 2

Summary of argument ..... 5

Argument ..... 6

I

The constitutional "privilege of the writ of habeas corpus" does not extend to an alien captured abroad by the military as an enemy, with no other connection to the United States, regardless of the location of detention ..... 6

A. Rasul and place of detention ..... 6

B. Part of the population ..... 8

II

Recent historical research refutes rather than supports petitioners' claims to a constitutional right to habeas review ..... 15

III

Where the executive and legislative branches have jointly decided a question of foreign and military policy, the judiciary should not interfere ..... 18

Conclusion ..... 20

## TABLE OF AUTHORITIES

### Cases

Boumediene v. Bush, 127 S. Ct. 1478,
167 L. Ed. 2d 578 (2007) ..... 5

Boumediene v. Bush, 127 S. Ct. 3078 (2007) ..... 5

Boumediene v. Bush, 476 F. 3d 981
(CADC 2007) ..... 3, 4, 5, 14, 18

Case of the Hottentot Venus, 104 Eng. Rep. 344
(K. B. 1810) ..... 11, 12

Ex parte D'Olivera, 7 F. Cas. 853 (No. 3,967)
(CC Mass. 1813) ..... 12

Felker v. Turpin, 518 U. S. 651, 116 S. Ct. 2333,
135 L. Ed. 2d 827 (1996) ..... 9

Furly v. Newnham, 99 Eng. Rep. 269
(K. B. 1780) ..... 15

Hamdan v. Rumsfeld, 548 U. S. __, 126 S. Ct. 2749,
165 L. Ed. 2d 723 (2006) ..... 18

Hamdi v. Rumsfeld, 542 U. S. 507, 124 S. Ct. 2633,
159 L. Ed. 2d 578 (2004) ..... 7

In re Guantanamo Detainee Cases,
355 F. Supp. 2d 443 (DC 2005) ..... 2, 3

INS v. St. Cyr, 533 U. S. 289, 121 S. Ct. 2271,
150 L. Ed. 2d 347 (2001) ..... 9, 10

Johnson v. Eisentrager, 339 U. S. 763, 70 S. Ct. 936,
94 L. Ed. 1255 (1950) ..... 8

Khalid v. Bush, 355 F. Supp. 2d 311 (DC 2005) .. 2, 3

King v. Cowle, 97 Eng. Rep. 587 (K. B. 1759) ..... 7

King v. Schiever, 97 Eng. Rep. 551
(K. B. 1759) ..... 14, 15

Kokkonen v. Guardian Life Ins. Co. of America,
511 U. S. 375, 114 S. Ct. 1673,
128 L. Ed. 2d 391 (1994) ..... 6

Lockington's Case, Brightly 269, 5 Am. L. J. 92
(1813) ..... 13

Marbury v. Madison, 1 Cranch (5 U. S.) 137,
2 L. Ed. 60 (1803) ..... 9, 19

Mathews v. Diaz, 426 U. S. 67, 96 S. Ct. 1883,
48 L. Ed. 2d 478 (1976) ..... 19

Oetjen v. Central Leather Co., 246 U. S. 297,
38 S. Ct. 309, 62 L. Ed. 726 (1918) ..... 19

Rasul v. Bush, 542 U. S. 466, 124 S. Ct. 2686,
159 L. Ed. 2d 548 (2004) ..... 6, 9, 10, 12, 18

Shaughnessy v. United States ex rel. Mezei,
345 U. S. 206, 73 S. Ct. 625,
97 L. Ed. 956 (1953) ..... 9

Sommersett v. Stewart, 98 Eng. Rep. 499
(K. B. 1772) ..... 11

Steel Co. v. Citizens for Better Environment,
523 U. S. 83, 118 S. Ct. 1003,
140 L. Ed. 2d 210 (1998) ..... 13

The Case of the Three Spanish Sailors,
96 Eng. Rep. 775 (C. P. 1779) ..... 13

The Japanese Immigrant Case, 189 U. S. 86, 23 S. Ct. 611, 47 L. Ed. 721 (1903) ..... 7, 8, 9

United States v. Villato, 2 Dall. 370 (CC Pa. 1797) ..... 12

Wilson v. Izard, 30 F. Cas. 131 (No. 17,810) (CC NY 1815) ..... 12

**United States Constitution**

Article I, § 9, cl. 2, of the Constitution ..... 6, 19

**United States Statutes**

28 U. S. C. § 1292(b) ..... 3

28 U. S. C. § 2241 ..... 4, 6

Detainee Treatment Act of 2005, Pub. L. No. 109-148, Title X, 119 Stat. 2680, 2739-2744 (2005) ..... 3, 6

Military Commissions Act of 2006, § 9, Pub. L. No. 109-366, 120 Stat. 2600 ..... 3, 4

Public Law 109-163, § 1405(e)(1), 119 Stat. 3477 .. 7

**Secondary Sources**

Halliday & White, The Suspension Clause: English Text, Imperial Context, and American Implications (Social Science Research Network), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008252 ..... 15, 16, 17

IN THE

# Supreme Court of the United States

---

LAKHDAR BOUMEDIENE, et al., *Petitioners*,

*vs.*

GEORGE W. BUSH,
President of the United States, et al., *Respondents*.

---

KHALED A. F. AL ODAH, next friend of
FAWZI KHALID ABDULLAH FAHAD AL ODAH, et al.,
*Petitioners*,

*vs.*

UNITED STATES, et al., *Respondents*.

---

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

---

## INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance

---

1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission

with the rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In arguing that the repeal of habeas jurisdiction in the Military Commissions Act is unconstitutional, Petitioners propose an excessively broad view of the Suspension Clause. Adoption of these arguments would hinder the executive and legislative branches in their efforts to combat both terrorism and ordinary crime to a much greater degree than the Constitution actually requires. Such restrictions would be contrary to the interest CJLF was formed to protect.

## SUMMARY OF FACTS AND CASE

Petitioners are aliens detained at the Naval Base in Guantanamo Bay, Cuba. See Brief for Respondents in Opposition 2. The Guantanamo detainees include persons captured in war in Afghanistan and persons taken into custody in other countries. See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 446 (DC 2005); see also *Khalid* v. *Bush*, 355 F. Supp. 2d 311, 316 (DC 2005) (petitioners captured in Bosnia or Pakistan, no connection with U. S. except as detainees); see also Brief for Petitioners Al Odah, et al. 2 (Al Odah Brief) (petitioning for the *Al Odah* detainees, four petitioners from Kuwait, and the *Abdah* detainees, seven petitioners from Yemen).

Each petitioner has been judged to be an "enemy combatant in the ongoing armed conflict against the al Qaeda terrorist organization and its supporters" by a Combatant Status Review Tribunal (CSRT). See Brief for Respondents in Opposition 2. Congress has provided for review of that determination in the United States Court of Appeals for the District of Columbia. *Ibid.* Furthermore, Congress has provided that the

D. C. Circuit may hear challenges to the scope of review provided by the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Title X, 119 Stat. 2680, 2739-2744 (2005) (DTA). See DTA § 1005(e)(2), (3), amended by Military Commissions Act of 2006, § 9, Pub. L. No. 109-366, 120 Stat. 2600 (MCA).

Instead, petitioners have challenged the constitutionality of their CSRT review through habeas petitions. Specifically they challenge the constitutionality of the DTA and the MCA. See Boumediene Brief 7-8; see also Al Odah Brief 9-10; see also Brief for Petitioners El-Banna, et al. 11-12 (El-Banna Brief).

Petitioners have filed petitions for writs of habeas corpus alleging violations of the Constitution, treaties, and the common law. See *Boumediene* v. *Bush,* 476 F. 3d 981, 984 (CADC 2007). The present case is the result of appeals consolidated after the decisions of the District Court of the District of Columbia. See *ibid.*

In the "Al Odah" cases, Judge Green denied the government's motion to dismiss with respect to the claims arising from alleged violations of the Fifth Amendment's Due Process Clause and the Third Geneva Convention, but dismissed all other claims. See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d, at 481. Judge Green then certified the order for interlocutory appeal under 28 U. S. C. § 1292(b), and the government appealed. *Boumediene*, 476 F. 3d, at 984. The detainees cross-appealed. *Ibid.* In the "Boumediene" cases, Judge Leon dismissed the cases in their entirety, stating that nonresidents' rights were "subject to both the military review process already in place and laws Congress had passed defining the appropriate scope of military conduct towards these detainees." *Khalid*, 355 F. Supp. 2d, at 330.

While the appeals were pending, Congress enacted the MCA. Section 7(a) of the MCA replaced subdivision (e) of § 2241:

> "(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> "(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

Section 7(b) of the MCA expressly made the change applicable to pending cases.

In February 2007, the Court of Appeals for the District of Columbia Circuit decided the consolidated appeals. The Court of Appeals dismissed petitioner's pending habeas actions for lack of jurisdiction, *Boumediene*, 476 F. 3d, at 994, holding that the MCA "strips jurisdiction over detainee cases," including pending habeas cases. *Id.*, at 988. The Court of Appeals also rejected the constitutional attack on the MCA. *Id.*, at 991-992. The Court of Appeals reasoned that because " '[n]othing in the text of the Constitution extends' " to alien enemies who have never been in United States territory, the Suspension Clause does not grant peti-

tioners such a right. *Id.*, at 990-992 (quoting *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950)). Judge Rogers dissented.

This Court initially denied petitioners' petition for certiorari. *Boumediene* v. *Bush*, 127 S. Ct. 1478 (2007). In June 2007, this Court granted rehearing and granted the petition. *Boumediene* v. *Bush*, 127 S. Ct. 3078 (2007).

## SUMMARY OF ARGUMENT

The "privilege of the writ of habeas corpus" protected by the Suspension Clause is limited to people who are part of the population of the United States, as that term is used in *The Japanese Immigrant Case*. That term is broader than just citizens; it includes resident aliens and even visitors. However, it is not so broad as to include persons who had never entered the United States or any area under its control prior to being brought in as military prisoners.

None of the historical cases cited by petitioners or supporting *amici* extended the writ to anyone in petitioners' status. *Schiever's Case* expressly denied habeas review on the ground that the petitioner was "the King's prisoner of war . . . ." Recent historical research, relied on by *amici* Legal Historians, undercuts rather than supports their position.

Unlike the Court's prior detainee cases, this case involves an unambiguous repeal of habeas jurisdiction by Congress, expressly applicable to this case. Petitioners are therefore asking the judicial branch to overrule a joint decision of both of the political branches on a question of foreign and military policy. The judiciary is not the proper forum for such issues. The detainees'

remedies are those Congress has provided plus the diplomatic efforts of their home countries.

## ARGUMENT

### I. The constitutional "privilege of the writ of habeas corpus" does not extend to an alien captured abroad by the military as an enemy, with no other connection to the United States, regardless of the location of detention.

Article I, § 9, cl. 2, of the Constitution provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Petitioners argue that the Suspension Clause limits Congress's ability to suspend their privilege to habeas corpus. This argument depends on the premise that petitioners are holders of the "privilege" referred to in the Suspension Clause. They are not.

*A. Rasul and Place of Detention.*

"It is the holdings of our cases, rather than their dicta, that we must attend . . . ." *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U. S. 375, 379 (1994). The question presented in *Rasul* v. *Bush*, 542 U. S. 466, 475 (2004), and hence the holding of the case, concerned the scope of the habeas statute as it then read. The statute at that time made no distinction between citizens and aliens. See *id.*, at 481. The discussion of the rights of aliens to habeas review at common law, see *id.*, at 481-482, n. 11, is dictum.

As subsequently amended, 28 U. S. C. § 2241 now distinguishes between aliens detained as enemy combatants and other persons. See § 2241(e). Unlike the previous, short-lived amendments of Public Law 109-

148, § 1005(e)(1), 119 Stat. 2742, and Public Law 109-163, § 1405(e)(1), 119 Stat. 3477, the current habeas statute does not distinguish cases according to the place of detention. The question of whether the amended habeas statute violates the Suspension Clause should therefore begin with the distinction drawn by Congress based on the status of the alien, not the distinction based on the location of detention that is the primary basis of the Court of Appeals' opinion.

Discussions of the history of the writ often conflate issues of territorial reach with issues of the petitioner's status. See, *e.g.*, Boumediene Brief 11-15. It is important to keep the issues distinct. Cases such as *King* v. *Cowle*, 97 Eng. Rep. 587 (K. B. 1759), are relevant only to the territorial question. Whether the writ of habeas corpus could issue to various places that had come into the British Empire by various means, see Boumediene Brief 14, is a separate question from who was entitled to the "privilege" at common law.

The privilege of habeas corpus was meant only to protect those who were "part of [the] population." *The Japanese Immigrant Case*, 189 U. S. 86, 101 (1903). Aliens detained as enemy combatants, arrested overseas and detained by the military on a military base, have never become part of the population. They would not be part of the population regardless of whether they were detained in Guantanamo Bay, South Carolina, or Afghanistan. In *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 524 (2004), concerning the review available to a citizen detainee, the plurality said, "It is not at all clear why [place of detention] should make a determinative constitutional difference." There is also no good reason why it should make such a difference in the case of aliens who are not part of the population.

*B. Part of the Population.*

The fact that the United States has generously extended constitutional protection to aliens living within the country, to visitors, and even to those who enter illegally, does not support a conclusion that we must extend the full panoply of constitutional rights to every alien who happens to be on territory in the control of our government. The government's ability to grant or deny a right depends on whom that right was placed in the Constitution to protect. See *Johnson* v. *Eisentrager*, 339 U. S. 763, 770-771 (1950). History shows that the purpose of the Suspension Clause was to protect the people of the United States.

*Eisentrager*, *supra*, at 777-778, rejected a claim of a constitutional right to habeas corpus by enemy aliens. While the *Eisentrager* decision emphasized the fact that the enemy aliens were outside the United States, it did not address the territorial application of habeas corpus alone. The Court also noted, "The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Id.*, at 770. The question is where the petitioners are on that scale and where one must be to hold the privilege of the writ of habeas corpus.

In *The Japanese Immigrant Case*, the petitioner was "an alien, who has entered the country, and has become subject in all respects to its jurisdiction, *and a part of its population*, although alleged to be illegally here . . . ." 189 U. S., at 101 (emphasis added). Thus, although Ms. Yamataya, the alien subject to deportation in *The Japanese Immigrant Case*, had been in the United States for less than two weeks, *id.*, at 87, she was entitled to basic due process. See *id.*, at 101. Aliens outside the population are not entitled to basic due process. Such aliens are only afforded the process

Congress has provided to them. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 212 (1953). Thus, a would-be immigrant "on the threshold of initial entry stands on a different footing" even when he was within the territorial boundaries of the United States (Ellis Island) and deprived of his liberty by agents of the federal government. See *id.*, at 213.[2]

Petitioners argue that they have a constitutional right to habeas corpus as it existed in 1789. They base their claim on this Court's ruling in *INS* v. *St. Cyr*, 533 U. S. 289, 301 (2001). *St. Cyr* indicates that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.' "[3] However, this right exists only for those who were "part of its population," *The Japanese Immigrant Case*, 189 U. S., at 101, and who were detained under federal law. See *Felker* v. *Turpin*, 518 U. S. 651, 663 (1996) (establishing that the first Congress only extended habeas to those held "under the authority of the United States"). English decisions from the time of the Founding and earlier, as well as early American decisions, clarify the limits of constitutional protection. At best, habeas corpus " 'as it existed

---

2. The Government did not contest that he could challenge his detention by habeas corpus. See *ibid.* Like the petitioners in *Rasul* v. *Bush*, 542 U. S. 466, 483-484 (2004), he was within the terms of the habeas statute, and the Suspension Clause was not at issue.

3. The need for the hedge phrase "at the absolute minimum" is unclear. The entire legitimate basis of judicial review of statutes is to protect the people's sovereign right to make the principles they put into the Constitution permanent until they choose to change them by amendment. See *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 176 (1803). An alteration of the scope of a constitutional provision by the judiciary would be every bit as much a violation of the people's "original and supreme will," *ibid.*, as would an alteration by the legislature.

in 1789' " extended to territories and not to aliens who were not a "part of its population."

In *St. Cyr*, this Court upheld the authority of federal courts to grant a writ of habeas corpus to an alien who had been "admitted to the United States *as a lawful permanent resident* in 1986." 533 U. S., at 293 (emphasis added). The Court granted St. Cyr's petition to review the legal question of whether discretionary deportation relief under Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) could apply to an alien who had pled guilty to a deportable crime before either IIRIRA or the AEDPA had been enacted. *Id.*, at 292-293. While this Court recognized that the case had the potential to raise the question "of what the Suspension Clause protects," this Court declined to address the constitutional issue. *Id.*, at 301, n.13. To inform its statutory interpretation, the Court examined the historical exercise of habeas jurisdiction in England and the United States. See *id.*, at 301. In its analysis, this Court found that "[i]n England prior to 1789, in the Colonies and in this Nation during the formative years of our Government, the writ of habeas corpus was available to *nonenemy* aliens as well as to citizens." *Ibid.* (emphasis added).

*St. Cyr* relied on a number of cases to support this conclusion. See 533 U. S., at 302, n.16 (citing *Sommersett* v. *Stewart*, 20 How. St. Tr. 1, 79–82 (K. B. 1772); *Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K. B. 1810); *King* v. *Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K. B. 1759); *United States* v. *Villato*, 28 F. Cas. 377 (No. 16,622) (CC Pa. 1797); *Commonwealth* v. *Holloway*, 1 Serg. & Rawle 392 (Pa. 1815); *Ex parte D'Olivera*, 7 F. Cas. 853 (No. 3,967) (CC Mass. 1813)). *Rasul*, 542 U. S., at 481, n. 11, cited largely the same

cases to support the proposition that the writ extended to "claims of aliens detained within the sovereign territory of realm," omitting the word "nonenemy." On closer examination, each case falls into one of three classifications. The first type extends habeas relief to a person who is a part of the population, even if not a citizen. The second type denies relief without distinguishing the merits from jurisdiction. The third type supports the argument that aliens captured as enemies by the military and otherwise unconnected with the country are not eligible for habeas relief.

*Sommersett* v. *Stewart*, 98 Eng. Rep. 499 (K. B. 1772), is a case of the first kind. Sommersett was a slave purchased in Africa and taken to Virginia, where slavery was legal. His owner, Stewart, brought him to England, where his advocates argued it was not. See *id.*, at 499. Although not originally from Britain or any of its possessions, he had been brought into the British Empire legally and permanently. He could be considered a "part of its population." The court heard his case on the merits without objection and granted relief. See *id.*, at 510.

The *Case of the Hottentot Venus*, 104 Eng. Rep. 344 (K. B. 1810) is similar.[4] Saartje Baartman, a native of South Africa and member of the Hottentot nation, was said to be "remarkable for the formation of her person" and was being exhibited to curious Londoners "under the name of the Hottentot Venus." *Id.*, at 344. Third parties, doubtless appalled by this spectacle, alleged "that she had been clandestinely inveigled from the Cape of Good Hope, without the knowledge of the British Governor, (who extends his peculiar protection

---

4. This case postdates the Suspension Clause, but it is close enough to have some relevance to the understanding of habeas corpus in 1789.

in nature of a guardian over the Hottentot nation *under his government . . .*) . . . ." *Ibid.* (emphasis added). Although Ms. Baartman may not have been considered a British subject in the strict sense of the word, neither was she a stranger to the British Empire. The court evidently regarded her as a resident of a British protectorate and a person within the protection of the Crown. On motion of the Attorney General, the court appointed investigators to determine if she was a willing participant and dismissed the proceedings upon determining that she was. See *id.*, at 344-345.

*Rasul*, 542 U. S., at 481, n. 11, cites three early American cases as examples of habeas petitions by aliens:

> "*United States* v. *Villato*, 2 Dall. 370 (CC Pa. 1797) (granting habeas relief to Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States); *Ex parte D'Olivera*, 7 F. Cas. 853 (No. 3,967) (CC Mass. 1813) (Story, J., on circuit) (ordering the release of Portuguese sailors arrested for deserting their ship); *Wilson* v. *Izard*, 30 F. Cas. 131 (No. 17,810) (CC NY 1815) (Livingston, J., on circuit) (reviewing the habeas petition of enlistees who claimed that they were entitled to discharge because of their status as enemy aliens)."

While these cases do support the limited proposition for which *Rasul* cites them, none involves a captured enemy held by the military. *Villato* and *D'Olivera* are both routine uses of habeas corpus for pretrial review in cases of defendants held for trial in civilian courts. In both *Villato* and *Wilson*, and arguably in all three, the petitioners were part of the population of the United States within the broad meaning of *The Japanese Immigrant Case*.

Another case of this type is *Lockington's Case*, Brightly 269, 5 Am. L. J. 92 (1813). The petitioner was a resident alien who had come to reside in the United States before the war began. See 5 Am L. J., at 92. The chief justice expressly distinguished the situation of such a resident alien from a prisoner of war "brought among us by force; and his interests were never, in any manner, blended with those of the people of this country." Far from supporting a right to habeas for the petitioners in the present case, who were "brought among us by force," *Lockington's Case* refutes any such right.

*The Case of the Three Spanish Sailors*, 96 Eng. Rep. 775 (C. P. 1779) is a case of the second type. The three sailors were undisputedly captured as enemy aliens and prisoners of war in the first instance, but they claimed they had ceased to be such by their voluntary service on an English merchant vessel. See *id.*, at 775. The holding was that on their own showing they were enemy aliens and prisoners of war and as such the courts "can give them no redress." *Id.*, at 776. The court went on to say that if their allegations were true "it is probable they may find some relief from the Board of Admiralty." *Ibid.*

Even in the modern era, the line between jurisdiction and merits is sometimes obscure. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 112-113 (1998) (Stevens, J., concurring in the judgment). It may be clear that a party is not entitled to relief without being clear whether the reason is jurisdictional or substantive. To conclude on the basis of this sketchy report that the court actually grappled with and decided a subtle distinction is quite a stretch. The court simply decided on the pleadings that the petitioners could get no relief from the judiciary and had to ask the executive.

Judge Rogers' dissent in the Court of Appeals cites *King* v. *Schiever*, 97 Eng. Rep. 551 (K. B. 1759), to illustrate that the writ at common law would have extended to aliens under the control of the Crown. *Boumediene* v. *Bush*, 476 F. 3d 981, 1001 (CADC 2007). Schiever was a Swedish subject who claimed he had been forced into service on a French privateer before the privateer was captured by the English. See 97 Eng. Rep., at 551. He then became England's prisoner of war. In her dissent, Judge Rogers used *Schiever* to infer that courts would extend the writ to enemy aliens. "The habeas court ultimately determined, on the basis of Schiever's testimony that he was properly characterized [as a prisoner of war] and thus lawfully detained." 476 F. 3d, at 1001 (citing *Schiever*, 97 Eng. Rep., at 551-552). The report cited by Judge Rogers states, "the Court thought this man, upon his own showing, clearly a prisoner of war, and lawfully detained as such. Therefore they ¶ Denied the motion." *Ibid.* Schiever's "own showing" was the affidavit he produced to support his petition for a writ of habeas corpus. *Id.*, at 551. In this report, *Scheiver* appears to be a case of the second type, denying relief without distinguishing merits from jurisdiction.

In another report of the same case, *Schiever's Case*, 96 Eng. Rep. 1249 (K. B. 1759), there is a more extended report of the holding. From this report, it appears that *Schiever* is a case of the third type, refuting petitioners' argument.

> "He is the King's prisoner of war, and we have nothing to do in that case, nor can we grant an habeas corpus to remove prisoners of war. His being a native of a nation not at war does not alter the case, for by that rule many French prisoners might be set at liberty, as they have regiments of many

> other kingdoms in their service, as Germans, Italians, &c.
>
> "But, if the case be as this man represents it, he will be discharged upon application to a Secretary of State." *Id.*, at 1249.

In other words, the court did not adjudicate whether his detention as a prisoner of war was proper and expressed an opinion that it was not if his allegations were true, yet the court washed its hands of the case anyway. Indeed, the reluctance of the courts to interfere with the custody of military prisoners was so great that even the writ of habeas corpus ad testificandum would not issue to bring the prisoner into court to testify, deferring to the executive as to whether the prisoner would be produced. See *Furly* v. *Newnham*, 99 Eng. Rep. 269 (K. B. 1780). In short, no reported case from the Founding era or earlier supports the proposition that military prisoners with no prior connection with the kingdom were entitled to habeas review, and some cases refute that claim.

## II. Recent historical research refutes rather than supports petitioners' claims to a constitutional right to habeas review.

*Amici* Legal Historians cite a forthcoming article, Halliday and White, the Suspension Clause: English Text, Imperial Context, and American Implications. This article is available at the Social Science Research Network, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008252. Professor Halliday has informed *amicus* CJLF that the paper will be published in next May's Virginia Law Review. The research in this article of unpublished manuscripts in habeas cases is indeed important, but it does not support the proposition that

persons in the status of the petitioners are constitutionally entitled to habeas.

The main theme of the Halliday and White article is that the writ of habeas corpus was a part of the relationship between the king and his subjects. "As we shall see, this prerogative power, whether running through the writ of habeas corpus or through the king's suspension of law [*e.g.*, by pardon], was invariably connected to his obligation to protect and further the good of his subjects." Halliday & White, *supra*, at 25.

Subjects, for this purpose, encompassed a broader class of persons than those born in England or naturalized. The term also included "local subjects." *Id.*, at 26 (quoting M. Hale, The Prerogatives of the King 54 (D. Yale ed. 1976)). This category included foreigners present in the kingdom as residents or visitors, even if they were "enemies" in the sense of being subjects of a country at war with England. *Id.*, at 26-27. Such aliens owed a duty of allegiance and were entitled to the king's protection while in the kingdom.

This is the basis for the assertion that habeas corpus was routinely available to aliens, even "enemies," usually without even raising the issue of their alienage. Halliday and White quote Hale for the proposition, " 'If any alien enemy reside or come into the kingdom, *and not in open hostility*, he owes an allegiance to the king [by reason of place].' " *Id.*, at 27 (emphasis added). They note the case of DuCastro (or DuCastre), who was accused of being a spy. *Id.*, at 27, n. 72. *Amici* Legal Historians rely on *DuCastro* for the proposition that status as a foreigner does not disentitle an alleged enemy from habeas relief. See Legal Historians Brief 6. However, *DuCastro* appears to be distinguishable from the present case. From the manuscripts relied on by the Legal Historians, it appears that a warrant was issued for DuCastro's arrest, implying he was already in

the country. Unlike Schiever, see *supra*, at 14, and unlike petitioners in the present case, DuCastro was apparently not captured abroad and brought in as a military prisoner.

Halliday and White also note cases of foreign sailors impressed into service in the navy. See Halliday & White, *supra*, at 27, n. 73. Like the cases previously discussed, a sailor on a British-flag ship was a resident of a place under British control, and he was a part of the population for this purpose.

Because the writ of habeas corpus was an aspect of the relation of king to subject, it followed British subjects to any place in the world where the power of the crown reached. This included places where English property law and most common law writs did not reach. See *id.*, at 51-52. By the time of the American Revolution, habeas corpus was a "critical marker of subjecthood," and its removal was considered a violation of the Americans' rights. See *id.*, at 52. When Parliament suspended the writ in America but not in England, Sir Edmund Burke denounced the discrimination between two classes of subjects in a pamphlet widely distributed in America. See *id.*, at 65-67.

Near the end of the article, Halliday and White criticize a statement in the Court of Appeals' opinion in the present case that in 1789 " 'habeas corpus would not have been available to aliens without presence or property within the United States.' " *Id.*, at 116 (quoting *Boumediene*, 476 F. 3d, at 990). Yet that statement is fully consistent with the theme of the article that the historical purpose of the writ was to question the custody of "subjects," as broadly defined to include aliens permanently or temporarily residing in areas under British control. The Court of Appeals' statement is not inconsistent with any case Halliday and White cite to support their thesis. An alien cap-

tured by the military in a foreign land whose only presence in British-controlled lands was as a military prisoner was not a "subject" even in the broadest possible sense of the word.

The latest historical research thus brings us back to where we started with *The Japanese Immigrant Case*. The "part of its population" criterion of that case is substantially equivalent to the broadly defined "subjects" of Halliday and White's historical analysis. *Schiever's Case*, see *supra*, at 14, remains the closest analogy to the present case. Persons who are not part of the population are not holders of the historical constitutional "privilege of the writ of habeas corpus," and Congress is well within its authority to repeal habeas jurisdiction as to such persons.

## III. Where the executive and legislative branches have jointly decided a question of foreign and military policy, the judiciary should not interfere.

The present case comes to the Court in a very different posture regarding separation of powers than the previous cases. In *Rasul* v. *Bush*, 542 U. S. 466 (2004), and *Hamdan* v. *Rumsfeld*, 548 U. S. __, 126 S. Ct. 2749 (2006), there was room for doubt on interpretation of the pertinent Acts of Congress. In the present case, there is no doubt. The statutory language is as clear as words can be that Congress repealed habeas jurisdiction for these petitioners and that the repeal applies to pending cases. The Court of Appeals aptly characterized the argument to the contrary as "nonsense." *Boumediene* v. *Bush*, 476 F. 3d 981, 987 (CADC 2007).

In the previous cases, this Court determined that executive decisions regarding the conduct of the war on

terror were contrary to the law enacted by Congress. In this case, petitioners ask the Court to overrule a joint decision of the executive and legislative branches. That is a far different matter. Whatever the relative roles of the executive and legislative branches in foreign policy may be, the role of the judiciary is minimal. See *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302 (1918). This primacy of the political branches extends to the treatment of aliens. See *Mathews* v. *Diaz*, 426 U. S. 67, 81 (1976).

Certainly questions can be raised about the wisdom of current policies. The proper balance between security needs and America's relations with other countries and reputation in the world is debatable. See Al Odah Brief 2. But a court of law is not the forum for that debate. We are in a new kind of war, with a new kind of danger and a new kind of enemy. The proper response and the correct balance are political decisions for the political branches to make.

Where the statute is clear, the only justiciable question is whether it violates a permanent principle that the people have placed in the Constitution. See *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 176-177 (1803). Petitioners in this case are not holders of the "privilege of the writ of habeas corpus," U. S. Const., Art. I, § 9, cl. 2, as that privilege was understood by the people when they ratified that limit on congressional authority. The statute is not unconstitutional as applied to them. Their remedies are the reviews provided in the statutes and the diplomatic efforts of their home countries.

## CONCLUSION

The decision of the Court of Appeals for the District of Columbia Circuit should be affirmed.

October, 2007

Respectfully submitted,

KENT S. SCHEIDEGGER

*Attorney for Amicus Curiae*
*Criminal Justice Legal Foundation*